Supreme Court, U.S.
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No. 86-1057

In the Supreme Court of the United States

OCTOBER TERM, 1986

DRUMMOND COMPANY, INC., PETITIONER

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 402(a) of the Surface Mining Control and Reclamation Act of 1977, which requires coal mine operators to pay the Secretary of the Interior a fixed reclamation fee "per ton of coal produced," permits the Secretary to base this fee on the gross weight of the coal at the time of the initial sale, transfer, or use, without deductions for any impurities or water therein.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 796 F.2d 503. The opinion of the district court (Pet. App. 12a-42a) is reported at 610 F. Supp. 1489.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1986. The order denying rehearing was entered on September 26, 1986 (Pet. App. 43a). The petition for a writ of certiorari was filed on December 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1977, Congress enacted the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. 1202(a). A provision of SMCRA, 30 U.S.C. 1231, established the

Abandoned Mine Reclamation Fund to be used to pay for the restoration of lands harmed by past coal mining activities. Coal operators subject to the Act are required to pay a reclamation fee of "35 cents per ton of coal produced by surface coal mining * * * [,] 15 cents per ton of coal produced by underground mining", and 10 cents per ton of lignite coal (30 U.S.C. 1232(a)). Congress, estimating the cost to reclaim abandoned mines at between $7 billion and $10 billion (H.R. Rep. 95-218, 95th Cong., 1st Sess. 134, 135 (1977)), found that "[t]he burden of paying for reclamation is rightfully assessed against the coal industry." *Id.* at 136.

In order to implement the reclamation program, the Secretary of the Interior promulgated national regulations on December 13, 1977, establishing the procedures to be used by coal mine operators in computing their reclamation fee liability. 42 Fed. Reg. 62715. The regulations, codified at 30 C.F.R. 870.12 (1978), originally provided for the payment of the reclamation fee "on each ton of coal produced for sale, transfer, or use" based on "the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator." [1]

After he became aware of inconsistent interpretations of the regulations by local representatives of the Office of Surface Mining (OSM)—particularly in Alabama—and some confusion among coal mine operators as to how to calculate the "weight and value" of the coal, the Secretary

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[1] In the preamble to the 1977 regulations, addressing the question whether the reclamation fee would be paid on "run-of-mine" coal or "clean" coal, the Secretary stressed that the crucial factor was not the specific composition of the coal produced but, rather, the point in the mining operation at which the first sale or transfer occurred. 42 Fed. Reg. 62714. This interpretation of the 1977 regulation was repeated in an opinion of the Solicitor of the Office of Surface Mining, stating that (Pet. App. 27a):

> The fee must be determined by the weight and value of the coal at the time of initial bona fide sale.

proposed a clarifying regulation in December 1981. 46 Fed. Reg. 60778. The new regulation[2] added the following explanation to 30 C.F.R. 870.12(b) (emphasis in original):

> (3) The weight of each ton shall be determined by the actual gross weight of the coal.
>
> > (i) Impurities, including water, that *have not* been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator *shall not* be deducted from the gross weight.

2. On August 27, 1982, the petitioner filed this action in the United States District Court for the District of Columbia, seeking review of the June 30, 1982, clarifying regulation.[3] The petitioner also filed a similar action in the United States District Court for the Northern District of Alabama. The instant action was stayed, on petitioner's motion, pending disposition of the action in the Alabama district court. The Alabama court upheld the Secretary's regulations on May 18, 1983 (Pet. App. 44a-50a), and petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. The court of appeals reversed (*id.* at 51a-64a), holding that, while it agreed with the district court's finding that the challenged regulations are valid, the district court lacked jurisdiction over the action. The court of appeals found that 30 U.S.C. 1276(a)(1) "require[s] that judicial review of regulations having nation-wide application occur in the federal district court in the District of Columbia" (Pet. App. 58a).[4]

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[2] The Secretary emphasized that the purpose of the revised regulation was "to clarify the point in time of fee determination as well as the value and weight parameters for calculating reclamation fees." 47 Fed. Reg. 28574, 28577 (1982). See note 1, *supra*.

[3] The statute provides that national regulations are subject to review in the United States District Court for the District of Columbia Circuit within 60 days of their promulgation (30 U.S.C. 1276(a)).

[4] See note 3, *supra*.

Following the decision of the Eleventh Circuit, petitioner and respondent filed motions for summary judgment in the instant action. The district court granted summary judgment in favor of the Secretary (Pet. App. 12a-42a), rejecting petitioner's argument that the Secretary had exceeded his authority in promulgating the challenged regulations (*id.* at 13a). The district court relied on the "well established" principle that " 'great deference [must be shown] to the interpretation given the statute by the officers or agency charged with its administration' " (*id.* at 23a (citations omitted)), noting that "[d]eference becomes all the more important when the interpretation of an administrative regulation is involved" (*ibid.*). The district court found that the 1982 regulations—which interpreted, but did not change prior policy (*id.* at 36a-41a)—are consistent with the language of the statute (*id.* at 25a-28a) and are "patently consistent with the legislative intent of the Act" (*id.* at 33a).

On appeal, petitioner again argued that the regulations exceed the Secretary's authority under Section 402(a) of SMCRA, 30 U.S.C. 1232(a), and violate the plain language of the statute and the legislative intent in enacting Section 402. Petitioner also took issue with the scope of review employed by the district court, asserting that no deference should be accorded the Secretary's interpretation given what the petitioner viewed as the plain meaning of the statutory language. The court of appeals affirmed (Pet. App. 1a-11a). Concluding that neither the statute nor the legislative history defined the term "coal produced" (*id.* at 5a-6a), the court of appeals found the Secretary's construction of the term to be a reasonable exercise of his broad rulemaking authority to fill the statutory "gap in the regulatory regime" (*id.* at 9a).[5]

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[5] It has been reported that the Secretary has decided to propose an amendment to the regulation to permit deduction of the weight of excess water before calculation of the reclamation fee (Inside Energy

ARGUMENT

The court of appeals correctly concluded that the regulation, requiring the reclamation fee on the weight of coal produced at the time of the first sale, transfer of ownership or use by the operator to be calculated with no deductions for impurities that have not then been removed, is entirely consistent with congressional intent in establishing the Abandoned Mine Reclamation Fund under SMCRA. Further review by this Court is not warranted at this time.

The petitioner bases its request for review on three grounds. First, petitioner asserts that under the "plain meaning" of the term "coal" the Secretary can assess reclamation fees on coal only after all impurities, including moisture, have been removed (Pet. 15). Second, petitioner urges review on the ground that there is a conflict between the District of Columbia Circuit and the Third Circuit as to the validity of the fee assessment regulation (*id.* at 15-21). Finally, petitioner asserts that the statutory analysis employed by the court of appeals requires correction by this Court (*id.* at 21-22).

1. Petitioner states that "Congress' analysis of the costs associated with payment of reclamation fees by the coal industry was predicated on the assumption, not articulated in the text of the statute but nevertheless apparent from the House Report on the final bill, that the substance to be taxed was in fact combustible coal and not extraneous materials found with it or absorbed by it during or after mining" (Pet. 3 (footnote omitted)). Petitioner's argument has no basis in the statute, its legislative history, or in the consistent interpretation of the relevant term by the Secretary.

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with Federal Lands, Feb. 9, 1987, at 1; Coal Outlook, Feb. 16, 1986, at 1; Coal News, No. 4862, Feb. 16, 1987). This is inaccurate. Although such a proposed amendment is under consideration, no decision has yet been made as to whether it will be proposed.

Petitioner notes (Pet. 5) that the Secretary's regulations define "coal" as "combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous, or lignite by ASTM [American Society for Testing and Materials] Standard D 388-77" (30 C.F.R. 700.5). Preceding the definitional section of the regulations, however, is the statement that "[a]s used throughout this chapter, the following terms have the specified meaning *except where otherwise indicated*" (emphasis added). Thus, the Secretary is free to "otherwise indicate" a reasonable different meaning for the term "coal" in other circumstances, as in Section 870.12(b)(3)(i).

In any event, the term "coal" is not used independently in the relevant section of the statute or its implementing regulation. The term employed in 30 U.S.C. 1232(a), the reclamation fee section of the statute, is "coal produced." Both courts below found that this statutory term is ambiguous. "Production could reasonably be interpreted to include the entire process of extracting and selling coal, complete from pit to buyer's door, or it could refer solely to the process of extraction. * * * [N]owhere does the [SMCRA] specify what elements comprise a 'taxable' piece of coal" (Pet. App. 5a-6a (quoting district court at Pet. App. 25a-26a)). There is nothing unreasonable or "counterintuitive" (Pet. 13) about the Secretary's resolution of this ambiguity. Indeed, as the court of appeals noted, the record here shows that "the vast majority of U.S. coal operators, as well as OSM personnel outside of Alabama, interpreted the phrase 'coal produced' as do the revised regulations" (Pet. App. 6a).

The legislative history of the Act "does not disclose the requisite specific intent upon which a court could properly rely to overturn the Secretary's regulations" (Pet. App. 6a). Because neither the statute nor its history defines the term "coal produced," the Secretary's interpretation must be upheld if found to be consistent with legislative intent.

In enacting the Abandoned Mine Reclamation Fund provision of SMCRA, Congress expressed its concern with

the costs of "widespread environmental degradation associated with coal surface mining" (H.R. Rep. 93-1072, 93d Cong., 2d Sess. 116 (1974)), costs which, until then, had been unfairly borne by the local residents of the mined areas where states had not accepted responsibility for rehabilitating the sites of abandoned mines. Congress was aware of the need to generate sufficient funds to reclaim abandoned mines, a cost estimated at between $7 billion and $10 billion. H.R. Rep. 95-218, 95th Cong., 1st Sess. 135 (1977). The petitioner, in emphasizing "the economic harm imposed by the Secretary's regulations" on the industry (Pet. 14), ignores the countervailing concern of Congress that attention be paid to

> the protection of health or safety of the public; protection of the environment from continued degradation and conservation of land and water resources; the protection or enhancement of public facilities as part of reclamation of land and water conservation projects; the improvement of lands and waters to a suitable condition useful in economic social development; and research and demonstration relating to the development of surface mining reclamation and water quality control program methods.

H.R. Rep. 95-218, *supra*, at 169.

Congress was aware of the potential economic impact on the coal mining industry and addressed that concern by establishing three different flat tax rates per ton of coal produced, depending on the type of coal (30 U.S.C. 1232(a)). That Congress intended to create these three categories and no others is shown by the congressional rejection of suggestions that the tax be based on BTU or energy value of the coal produced (H.R. Rep. 93-1072, *supra,* at 116-117) or that deductions be permitted for excess moisture (120 Cong. Rec. H-25230 (1974)), precisely the deduction that petitioner seeks to have the Secretary establish by interpretation.[6]

[6] The legislative history on which petitioner relies (Pet. 3 n.2) is at best ambiguous. H.R. Rep. 95-218, *supra,* at 137 notes that the

The district court, in upholding the regulation, found that a tax based on gross weight as of a given time, instead of one based on the purity of the mined coal, was clearly consistent with congressional intent (Pet. App. 30a-31a): it was easily enforceable, avoiding the need to test the coal for particular impurities; it did not require the Secretary to choose among impurities, whether inherent, such as moisture, ash and sulfur, or extrinsic, such as dirt and clay, in order to define "the 'true' elements of 'pure' coal" (*id.* at 31a); and finally, it provided an equitable national standard.

2. Petitioner also urges review on the ground that there is a conflict between the District of Columbia Circuit decision in this case and the Third Circuit decision in *United States* v. *Brook Contracting Corp.*, 759 F.2d 320 (1985). But the current position of the Third Circuit is unclear. In *United States* v. *Devil's Hole, Inc.*, 747 F.2d 895 (3d Cir. 1984), the court found that anthracite silt was "coal" and therefore subject to reclamation fees. The court expressly affirmed "the Secretary's position that the noncombustible portion of the silt was properly included in calculating the weight upon which the reclamation fee was imposed." Pet. App. 71a; 747 F.2d at 899. In *Brook Contracting* (Pet. App. 65a-79a), however, a different panel of the Third Circuit disallowed the government's assessment of fees on the coal produced prior to first sale, stating that "as a matter of law * * * 'coal produced by surface coal

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reclamation fee may be reduced based on the "value of coal at the mine after extraction," thus implying that the fee is to be based on the rough ore, at the point of extraction, and in the condition in which it is at that time—i.e., that the coal is "produced" at that point. The other reference (*id.* at 149) discusses the relatively small contribution of the reclamation fee to the cost of coal, and defines the reclamation fee as one of the "production costs." This scarcely requires petitioner's conclusion that the fee must be based on the value of "clean coal"—that it cannot be considered to be "produced" until it is ready for consumption.

mining' means combustible coal that would qualify as such under ASTM standards and excludes the weight of rock, clay, dirt and other debris" (*id.* at 79a).[7] The Third Circuit has been asked to reconcile these different interpretations of the regulation at issue here in *United States* v. *Warren Troup,* No. 86-1409 (argued Jan. 21, 1987). In that case, as in *Devil's Hole,* there was expert testimony that the aggregate is combustible enough to qualify as coal under ASTM standards, but the district court, relying on *Brook Contracting,* nevertheless disapproved of the calculation of the fee based on the weight of the aggregate at the point of first sale.[8] Significantly, the court of appeals in *Troup* has informed the parties that it will withhold action on the appeal until this Court has acted on the instant petition (App. A, *infra*), thus indicating its reluctance to accept the *Brook Contracting* analysis.

We submit that the Third Circuit should be permitted to resolve the conflict within that circuit in the first instance. In resolving that conflict, the *Troup* court may well bring the Third Circuit into agreement with the District of Columbia's position in the instant case, thus eliminating the conflict which petitioner asks this Court to resolve. If, on the other hand, the *Troup* court should disagree with the

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[7] The *Brook Contracting* court distinguished *Devil's Hole* on the ground that there "the district court's finding that anthracite silt was 'coal' * * * was supported in the record by expert testimony and other evidence that anthracite silt was combustible and qualified as 'coal' " under ASTM standards (Pet. App. 71a).

[8] In *Troup,* the government also argued on appeal that the courts in the Third Circuit are without jurisdiction to consider the validity of the national regulations implementing SMCRA, in light of 30 U.S.C. 1276(a)(1). See note 3, *supra.* That interpretation of the statute was rejected in *Holmes Limestone Co.* v. *Andrus,* 655 F.2d 732 (6th Cir. 1981), cert. denied, 456 U.S. 995 (1982), but subsequently accepted in *Virginia* v. *Clark,* 741 F.2d 37 (4th Cir. 1984), cert. granted, 469 U.S. 979 (1984), dismissed by stipulation, 469 U.S. 1198 (1985), and by the Eleventh Circuit in this case (see page 3, *supra*).

decision of the court of appeals in the instant case, a petition for a writ of certiorari in *Troup,* raising both the jurisdictional issue (see note 8, *supra*) and the definitional issue, may be appropriate.

3. Finally, petitioner asserts that the decision below "violated fundamental precepts of statutory construction" in ignoring congressional intent (Pet. 21). Petitioner correctly notes (*id.* at 21-22) that both the agency and the reviewing court must "give effect to the unambiguously expressed intent of Congress" (*Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984)). But petitioner ignores the context in which the quoted language occurs. The agency interpretation may be ignored only when "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter" (467 U.S. at 842). The *Chevron* Court went on to emphasize that when "Congress has not directly addressed the precise question at issue, * * * the question for the court is whether the agency's [regulation] is based on a permissible construction of the statute" (*id.* at 843). The court of appeals correctly concluded that the instant case is governed by the latter principle; Congress did not address the precise issue of whether the reclamation fee was to be based on clean coal, and its use of the term "coal produced" is inherently ambiguous. Accordingly, as *Chevron* directs, the court below considered whether the agency's "view that [the regulation] is appropriate in the context of [the] particular program is a reasonable one" (*id.* at 845). Here, as in *Chevron,* affirmance of the agency interpretation followed from the conclusion that it reflected "a reasonable policy choice for the agency to make" (*ibid.*).

Far from being "misguided," as petitioner contends (Pet. 21), the court of appeals simply followed customary principles of statutory construction, rejecting "crabbed interpretations" of agency rulemaking powers (*In re Per-*

manent Surface Mining Regulation Litigation, 653 F.2d 514, 525 (D.C. Cir.), cert. denied, 454 U.S. 822 (1981)), and properly accorded "considerable weight * * * to [the] executive department's construction of a statutory scheme it is entrusted to administer," *Chevron,* 467 U.S. at 844 (footnote omitted); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965); *EPA* v. *National Crushed Stone Ass'n,* 449 U.S. 64, 83 (1980). In a similar context, the court of appeals correctly noted that such deference "is particularly appropriate when a complex regulatory statute emerges from a process of difficult legislative gestation" (*In re Permanent Surface Mining Regulation,* 653 F.2d at 522). There is no need for this Court to review the application of these established principles in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1987

APPENDIX

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Re: United States of America, Appellant vs. Troup, Warren, doing business as Warren Troup Coal Co., *No. 86-1409.*

Dear Counsel:

The Court wishes to advise counsel that it will withhold decision in the above case, which counsel argued on Wednesday, January 21, 1987, pending action by the Supreme Court on the petition for writ of certiorari (No. 86-1057) to the Court of Appeals for the District of Columbia Circuit in *Drummond Coal Co. v. Hodel,* 796 F.2d 503 (D.C. Cir. 1986). Counsel are requested to apprise this Court of any relevant developments in that case.

Very truly yours,

SALLY MRVOS, Clerk

By: /s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

MEF

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